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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 446

JOSEPH CASTELLI, A/K/A GIUSEPPE GAGLIANO,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 20–22, II. 82–84) [1] is reported at 306 F. 2d 640. The opinion of the district court (Pet. 16–19, I. 3–8, R. 20–24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1962 (II. 85). The petition for a writ

[1] Two volumes of appendices and proceedings in the court of appeals are referred to by Roman numerals. The record certified by the district court to the court of appeals is referred to by the prefix "R.," except the transcript of the hearing which is referred to with the prefix "Tr."

of certiorari was filed on September 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly found that petitioner had not sustained the burden of showing that a 1927 conviction, under which he had been deported, was invalid.

STATEMENT

On January 31, 1927, the petitioner pleaded not guilty in the District Court for the Southern District of New York to a charge of selling approximately one ounce of heroin (R.A. 1). On June 29, 1927, petitioner withdrew his former plea, entered a plea of guilty and was sentenced by Judge Knox to imprisonment for one year and one day in the penitentiary at Atlanta, Georgia. Later the same day his sentence was reduced to imprisonment for one year at the Westchester County Penitentiary (R.B.).

Petitioner was deported in 1955 on the basis of the 1927 conviction and re-entered illegally in 1958 (R. 10–19).

In June 1961, petitioner filed a motion in the sentencing court[2] supported by an affidavit in which he claimed that his conviction was invalid because he was not represented by counsel and was not informed of his right to counsel. The motion itself alleges that when petitioner was arrested in January of 1927 for

[2] The notice of motion stated: "This motion is made pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C. Sec. 1651(a), and *United States* v. *Morgan*, 346 U.S. 502" (R. 10).

selling narcotics, "we were kept at the jail on Centre Street for about three days, and then we were taken to the old Tombs. While we were in the jail at Centre Street, and while we were at the Tombs, we saw no one, had no visitors, were not told we had the right to have a lawyer, and we just waited" (R. 12). The Commissioner's docket (Government Ex. B, II. 81), introduced at the hearing on the motion, shows that petitioner and his co-defendant were arrested, arraigned, bonded (after two reductions) and released on bail, all on the same day. The court docket entries as to counsel are negative, showing neither an attorney for petitioner nor the name of the government attorney in the space provided therefor (R.A.).

Petitioner testified that after he was arrested in 1927 "somebody" told him while he was in jail that if he plead guilty he would receive a light sentence and would not be deported to Italy where he feared Mussolini (Tr. 34–35). He stated he had no lawyer (Tr. 36). When his counsel asked whether any judge had told him that if he wanted a lawyer one would be provided, the petitioner answered, "No, I don't understand nothing" (Tr. 38). He claimed he spoke only Italian at that time, had no interpreter, and understood very few words (Tr. 39–40).[3]

Petitioner testified that he did not remember everything which occurred after he was arrested in 1927—

[3] Petitioner was born in Italy in 1903 and came to the United States in 1921 (Tr. 40–42). In 1924, he was convicted in a New York State court on a narcotic offense and served two years (Tr. 43, 80–83). He also pleaded guilty to a charge in Louisiana in 1944. He said that he had a lawyer then and later received a pardon (Tr. 44–45, 87–88).

"because it's a long time" (Tr. 32), but that the police had asked him questions which he did not understand at the time because he could not understand English (Tr. 33, 165). Various official police records from 1924 and 1927 bearing petitioner's signature and fingerprints were admitted, on the back of which were answers obtained by police interrogation (Tr. 162, 164, 166, 167–171). Petitioner claimed he could not write (Tr. 42, 159). After being shown signatures in 1924 and 1927 of "Joseph Castelli" and "Giuseppe Gagliano" (Tr. 160, 162, 164), petitioner, while not admitting that he had signed his name, explained: "I sign the name if I take it easy. * * * I might sign it. If I take it easy, I sign" (Tr. 164).

When the petitioner was asked whether he had pleaded not guilty in 1927 or stood silent, he responded (Tr. 75):

> I can't remember everything, everything. That's a long time ago. Maybe if I say something I make a mistake; I can't remember anything.

Later, when asked whether he pleaded not guilty on January 31, 1927, he responded (Tr. 85):

> I can't remember everything. Why I got to say, if maybe I made a mistake, I can't remember everything.

Petitioner's wife testified that petitioner did not understand English when they were married in 1929 (Tr. 106–108).

Mr. Jonas A. Johnson, testified for the government that he was a deputy court clerk in 1927 and that, except in prohibition cases, if a defendant appeared

without a lawyer, it was the practice for either the clerk or the court to ask if he wished to have an attorney (Tr. 111–115). Petitioner presented Mr. Leonard Maran, a former Assistant United States Attorney, who stated that he had prepared an affidavit in 1953 based upon a conversation with Johnson (of which he had no present recollection) to the effect that it was not customary for the court in 1932 affirmatively to interrogate defendants with respect to their desire to have counsel appointed, except in very serious cases (Tr. 136–140). Johnson denied telling this to Maran and stated that, so far as he could remember, a defendant was always asked if he wished to have an attorney (Tr. 118–119), although judges did not customarily go into the matter as thoroughly as they do at present (Tr. 150–152). Johnson said he remembered no instance of a plea being accepted when the defendant appeared not to understand the charge (Tr. 154).

On November 3, 1961, the district judge denied petitioner's motion (R. 20–24). The court found that petitioner had not sustained the burden of overcoming the presumption of regularity attaching to the 1927 conviction. The judge said he did not believe the petitioner, and that petitioner had misstated the facts "in an attempt to escape the predicament he now finds himself in, having been apprehended for being in this country illegally and without the permission of the Attorney General, and facing as he does a new deportation proceeding" (R. 24). The court of appeals affirmed *per curiam* (II. 82–84).

ARGUMENT

The judgment of the court of appeals was entered on July 10, 1962. The petition for a writ of certiorari was filed in this Court on September 20, 1962. Since, as this Court held in *United States* v. *Morgan,* 346 U.S. 502, 505, fn. 4, a motion of this character, in the nature of a writ of *coram nobis,* is a step in the criminal case, the petition is out of time under Rule 22–2 of the Rules of this Court. Petitioner's notice of motion shows that he was aware of the *Morgan* decision and he is therefore properly held to the procedural consequences which flow from that decision.

In any event, the petition presents no question warranting review by this Court. As the Court said in *Morgan,* "It is presumed the proceedings were correct and the burden rests on the accused to show otherwise." 346 U.S. at 512. The district court properly found that petitioner had not sustained his burden.

As noted in the Statement, on the question of counsel, the court docket entry is neutral since, while it does not show that petitioner had an attorney, it is also blank in the space for the government attorney's name. In support of his very belated claim that he did not knowingly enter a plea of guilty, petitioner offered his own testimony. The trial judge could properly find it insufficient to upset a 1927 judgment which petitioner did not undertake to attack until after he had been deported and had re-entered the country illegally. The documentary record negated the allegations in his original affidavit that he had

been held incommunicado for several days.[4] The fact that petitioner was arrested, had bail reduced, and was ultimately released in one day, suggests that he had the assistance of counsel. The later change in the place of his confinement from the federal penitentiary to the Westchester County penitentiary confirms this impression. These circumstances, together with the record of petitioner's signature and his evasiveness in response to inquiries,[5] support the conclusion of the trial judge that petitioner was not a credible witness.

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[4] His subsequent testimony on this was not as explicit as his original allegations in the affidavit.

[5] Petitioner's reticence to answer questions except from his own counsel is exemplified by the examination as to his signature on the 1961 affidavit which formed the basis for the hearing (Tr. 64–65):

Q. Did you sign the affidavit?

A. I don't know if I sign it.

* * * * *

Q. Did you sign this paper?

A. I don't remember if I signed. I don't remember, I can't tell you, if I ever signed the paper.

* * * * *

And on questioning by the Court (Tr. 66):

The WITNESS: This is my name.

The COURT: Is it your signature? Did you sign that?

The WITNESS: I don't know.

The COURT. Out loud—I can't hear you.

The WITNESS: If it is on I must have signed.

The COURT: Don't you recognize your own signature?

The WITNESS: Yes.

The COURT: It is or it is not?

The WITNESS: It looks like my signature.

The COURT: The question is, is it your signature.

The WITNESS: I'm not sure if it is mine.

Petitioner's contention that the trial judge failed to specifically find the facts as required by Rule 52(a), F.R. Civil P. is without merit. The opinion of the trial judge embodies the finding of fact which is crucial to the disposition of this case, that petitioner had not offered probative evidence to overcome the presumption of regularity attacking to the 1927 judgment. In any event, the civil rules do not apply to this criminal proceeding. See *United States* v. *Morgan, supra,* 346 U.S. at 505, fn. 4.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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